Golden Cross Care II, Inc., d/b/a Golden Cross Health Care of Fresno *and* Hospital & Health Care Workers' Union, Local 250, Service Employees International Union, AFL–CIO. Case 32–CA–12588

September 19, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On September 23, 1993, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found, and we agree, that the Respondent became a successor employer on February 1, 1992. In finding that the Respondent successor's president, Marlene Robertson, played an active role at the nursing home during the month of February 1992, the judge cited, inter alia, the letter written by Leo Barfuss, one of the two partners in the predecessor Kearney Heights Care Center, Inc., to California's Department of Health Services on February 1, 1992, designating Robertson as acting director of nursing at the nursing home. The Respondent excepts, asserting that the letter constitutes hearsay, not within the exception of Fed.R.Evid. Rule 803(3), as found by the judge.

We find it unnecessary to rely on Barfuss' February 1, 1992 letter. The judge supported his finding that the Respondent controlled the nursing home during February 1992 with substantial evidence: (1) the Respondent's contract with Kearney Heights Care Center, Inc. afforded the Respondent veto power over changes in operations during the month of February; (2) notices posted at the facility on February 1, 1992, listed Robertson as acting director of nursing and these notices remained posted for the rest of the month; (3) the Respondent's counsel, Wilson Clark, informed the Board's investigator in his August 1, 1992 letter that Robertson was able to assess employees' abilities during the month of February while serving as acting director of nursing in order to determine who would be discharged and who would be retained; (4) the only two employees hired during February were referred by Robertson from one of her other nursing homes; and (5) Robertson, herself, told Union Field Representative Michael Guidry at the end of February that ''she was just running the place'' or ''managing [it] temporarily.''

We also agree with the judge's finding, for the reasons he states, that Clark's August 1, 1992 letter to the Board's investigator did not rely on Barfuss' February 1, 1992 letter.

Accordingly, we find it unnecessary to rely on Barfuss' February 1, 1992 letter in any way and we see no need to discuss Fed.R.Evid. Rule 803(3).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Golden Cross Care II, Inc., d/b/a Golden Cross Health Care of Fresno, Fresno, California, its officers, agents, successors, and assigns, shall, take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

''(d) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Hospital & Health Care Workers' Union, Local 250, Service Employees International Union, AFL–CIO as the exclusive representative of our employees in the following appropriate unit:

> All full time and regular part-time nursing attendants, certified nursing attendants, dietary aides, housekeeping aides, laundry aides, janitors and cooks employed at the nursing and convalescent health care facility located at 1233 A Street, Fresno, California; excluding registered nurses, licensed vocational nurses, guards and supervisors as defined by the Act.

WE WILL NOT effect mass terminations of employees regarded as less than satisfactory nor otherwise change any terms and conditions of employment of employees in the above-described appropriate bargaining unit without first giving notice to the above-named labor

organization and affording it an opportunity to bargain about that change.

WE WILL NOT discharge or otherwise discriminate against any employee to avoid having to deal with the above-named labor organization as the representative of employees in the above-described appropriate bargaining unit, nor because of activity or support for that labor organization or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the above-named labor organization, as the bargaining agent for our employees in the above-described appropriate bargaining unit, and embody any agreement reached in a written contract.

WE WILL, on request by that labor organization, rescind all changes in employment terms for employees in the above-described appropriate bargaining unit that were made on and after March 1, 1992, and make whole all employees and benefits funds, with interest, for any losses incurred as a result of those rescinded changes.

WE WILL offer immediate and full reinstatement to all employees in the job classifications of nursing attendants, certified nursing attendants, dietary aides, housekeeping aides, laundry aides, janitors, and cooks who were terminated on February 29 and March 1, 1992, dismissing, if necessary, anyone who may have been hired or assigned to the positions from which they were discharged or, if any of their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay and benefits they may have suffered as a result of their discriminatory discharges, with interest on the amounts owing.

WE WILL notify them that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

GOLDEN CROSS CARE II, INC., D/B/A GOLDEN CROSS HEALTH CARE OF FRESNO

David J. Dolloff, for the General Counsel.
James A. Bowles (Hill, Farrer & Burrill), of Los Angeles, California, and *Wilson Clark*, of San Dimas, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Fresno, California, on various dates between January 12 and 26, 1993. On August 20, 1992,[1] the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on June 15, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Although that complaint and its underlying charge were subsequently consolidated for hearing and decision with the charge and complaint in another case, by order consolidating cases, consolidated amended complaint, and notice of hearing issued on October 16 that other charge and the complaint arising from it settled before the hearing's commencement. Accordingly, I granted the General Counsel's motion to sever that charge and the allegations arising therefrom, leaving for hearing and decision the allegations arising from the charge in Case 32–CA–12588.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I enter the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted that since, at least, March 1 Golden Cross Care II, Inc., d/b/a Golden Cross Health Care of Fresno (Respondent) has engaged in operation of a nursing and convalescent health care enterprise at 1233 A Street, Fresno, California (the facility). In the course and conduct of the facility's operation during the first year of operating it, Respondent derived gross revenues in excess of $100,000 and, moreover, received revenues in excess of $5000 from the Medi-Care and Medi-Cal programs. Therefore, I conclude, consistent with paragraph 28 of Respondent's answer to consolidated amended complaint and with its representations at the hearing's commencement, that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Hospital & Health Care Workers' Union, Local 250, Service Employees International Union, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

This case presents issues under the successorship doctrine: see *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), arising from Respondent's acquisition of the facility and of a license to operate it from the State of California's Department of Health Services (DHS) during the first calendar quarter of 1992.

As a result of a Board-conducted representation election, in 1978 the Union became the bargaining agent of certain employees working at the facility. An ongoing bargaining relationship followed which, most recently, led to conclusion of a collective-bargaining contract for an effective term of September 1, 1989, through August 31, 1991, and, thereafter, to negotiations for a contract to succeed that one. In fact, agreement was reached on the terms for one during January.

[1] Unless stated otherwise, all dates occurred in 1992.

However, before it could be executed, the events giving rise to the facility's most recent change in ownership intervened. Nevertheless, the record shows that immediately prior to February 1 there had been a viable and ongoing collective-bargaining relationship with the Union as the collective-bargaining agent of certain facility employees.

There was some confusion regarding precise composition of the collective-bargaining unit. No one disputes that as of 1992 it had included nursing attendants, certified nursing attendants, dietary aides, housekeeping aides, laundry aides, janitors, and cooks. Nor is it disputed that registered nurses and licensed vocational nurses had been excluded from the unit. But, while it is not disputed that regular part-time employees have been historically included in the unit, there was some discrepancy about the number of hours needed to qualify for regular part-time status.

William Clark, one of Respondent's attorneys, testified that he had learned on February 29 that employees working ''less than 16 or 30 hours in a pay period'' were not included in the unit. However, both the 1989–1991 contract and the draft of a contract to succeed it contain an identical provision, section 8, subsection B, defining a regular part-time employee ''as one who works a regular predetermined work schedule of less than thirty-two (32) hours per week but not less than twenty (20) hours per week,'' and continues on to provide for proration of their contractual benefits ''based on average hours worked.''

Operations at the facility had been troubled during, at least, the latter 1980s and early 1990s. Indeed, in a position statement submitted to the Board's Regional Office on August 1, Attorney Clark pointed out ''that the subject facility has in the past six years undergone six changes in either corporate ownership, management, licensee or combinations thereof.'' His letter continues:

> Prior to March 1, 1992 the aforesaid changes were characterized by fiscal failure, decertification and threatened decertification and serious citations and heavy fines by DHS, primarily because of inferior patient care and deficiencies in dietary and overall facility maintenance.

As described in section IV, infra, Clark testified that certain other statements in that letter had been incorrect. However, he did not similarly retract or correct his above-quoted portrayal of the facility's difficulties during the over half decade prior to early 1992. To the contrary, the various changes mentioned in Clark's letter are detailed in the ''RECITALS'' section of an agreement to terminate lease, received as Respondent's Exhibit 2.

The crucial point of those transactions is that by January a limited partnership, MG Associates, owned the facility's premises, as well as its fixtures and equipment. Kearney Heights Care Center, Inc., a partnership of James E. Majerus and Leo J. Barfuss, was the facility's lessee, pursuant to an agreement dated April 12, 1990, with a written guarantee of performance by Majerus and Barfuss, dated May 21, 1990. Management of the facility was being performed by Leo C. Loevner, president of American Nursing Centers, Inc. Apparently, Loevner also had an interest in a corporation called Fresno 1233, Inc., to which Kearney Heights had tried to transfer lease rights on June 1, 1991, and, further, which Kearney Heights had retained to manage the facility by agreement of that same date. However, MG Associates had ''not consented to nor approved either agreement'' between Kearney Heights and Fresno 1233, Inc. Apparently in consequence, that is why Loevner still managed the facility at the beginning of 1992 through American Nursing Centers, Inc.

By then, interest in acquiring the facility had been displayed by Marlene Robertson. She had come to work in this country, apparently from the Philippines, and had worked as a registered nurse. In 1991 she acquired ownership of a Pasadena, California convalescent center called Golden Cross Health Care. Six years later she became part-owner of Good Shepherd Convalescent Center in Lake View Terrace, California, also in the Los Angeles area. She testified that she was not particularly conversant with labor-management relations. She had been a union member while working as a registered nurse, but there is no evidence of any specific union activity by her, beyond holding union membership, during that period. Moreover, she testified that employees at neither the Pasadena nor the Lake View Terrace facilities had been unionized when she had acquired her ownership interest in those centers. Nor had employees at either one become unionized by the time of the hearing in this proceeding.

During the late winter or early spring of 1991 Robertson came to Fresno ''to see the facility.'' While there she conducted a meeting with the facility's staff, alerting them to her interest in acquiring the facility. She acknowledged that, during that meeting, someone asked me a question about the Union.'' In fact, there is no dispute about Robertson's prepurchase knowledge regarding the unionized status of certain facility employees. She freely admitted that, when she purchased the facility in 1992, she had known that nursing attendants, certified nursing attendants, housekeeping, maintenance, laundry, cooks, and dietary aides were represented by the Union.

As it turned out, the deal fell through in early 1991; Robertson did not then acquire the facility. However, she did not abandon her efforts to do so. Articles of incorporation for Respondent were issued to Robertson, as incorporator, by the State of California on June 14, 1991. As far as the record discloses, at no point did she contemplate that, once incorporated, Respondent would operate any business enterprise other than the facility. On January 31, she executed a lease with MG Associates for ''the premises and personal property'' of the facility. On that same date she executed an agreement with Kearney Heights Care Center, Inc. to ''take over operation of the facility.'' Effectiveness of both documents was contingent on Respondent acquiring a license from DHS to operate the facility. Robertson completed her filing of application for one on February 10. That license ultimately issued on March 1, although Robertson had known earlier during February that it would issue on that date. In fact, she advanced internally contradictory testimony regarding that particular subject.

Called as an adverse witness by the General Counsel, she first testified ''I cannot recall'' if she had requested, of the DHS official with whom she had dealt, that the license issue on that date: '' don't recall. So talk to her about telling her to issue the license on that date.'' Subsequently, she testified that she had spoken with a different DHS official and denied having told him that she wanted the license to issue on

March 1. But when called as a witness by Respondent and asked when she had first known that a license would issue on March 1, she responded, ''That's what I requested is March 1,'' adding, ''In my application for license, I had written it March 1—'' and, further, ''That's a standard appli [sic]—when you apply for a license you have to put the change of ownership.''

The evidence shows that during February, receipts from and payments for the facility's operations continued to be received and paid by Kearney Heights. But, during that month several sequences of events unfolded. First, as discussed at greater length in section IV, infra, there were communications between Robertson and supervisors at the facility. At her direction some of those supervisors selected employees who would and who would not be employed by Respondent on and after March 1. By fax, in late February Robertson was provided with a list of employees to be retained.

Second, on February 4, during a meeting with Robertson, Attorney Clark prepared terms for an offer of employment. When finalized, it was presented, on and after February 29, to each of the employees whom Respondent was willing to continue employing after that date. Although existing wage rates would continue to be paid, the offer enumerated terms that constituted changes in pre-March 1 employment terms, such as for holidays, vacations, and sick leave. Importantly, that offer specifically recited that those benefits would not be available until employees ''completed their [90-working day] probationary period.'' Respondent does not deny that it never communicated with the Union about these changes before they were presented to employees on February 29 and were implemented on March 1.

Third, Respondent did not attempt to communicate with the Union during February. But, the latter made efforts to do so with Respondent. Prior to February Union Field Representative Michael Paul Guidry had been attempting to negotiate a contract to succeed the 1989–1991 one. As a result of telephone conversations and written communications with his opposite representative, Attorney Daniel T. Berkley, Guidry was told that Loevner was no longer managing the facility—Co-owner Majerus testified that, during January, Loevner had said that he was leaving and never coming back—and that there was a new owner. By letter dated February 4, to Guidry, confirming an earlier telephone conversation, Berkley stated, ''that on or about [January 30], American Nursing Centers, Inc., ceased to be managers of Kearney Heights Care Center. It is our information that some other entity is currently managing the facility.'' On that same date, responding to the conversation that Berkley's letter confirmed, Guidry sent a letter to Berkley, Loevner, and Facility Administrator John Ralff. In it, Guidry stated that it had ''come to the attention of Local 250, that a change of ownership/management has taken or is about to take place.'' The letter continues by stating that the Union ''hereby demands that you enter into negotiations with us over the impact of the change on bargaining unit members and to settle outstanding grievances.''

Receiving no response to that letter, Guidry journeyed to DHS' office where he reviewed available documents pertaining to the facility, including those naming Robertson and Respondent. He then prepared another letter, dated February 25, which he addressed to Barfuss, Ralff, Majerus, and Robertson. In addition to mailing copies to those addressees, on that same date he took a copy to the facility where he hand-delivered it to Administrator Ralff. While he was still at the facility, after having given the copy to Ralff, Guidry testified that ''Ralff indicated to me that he'd given [Robertson] one [of the letters].'' At another point Guidry testified, ''John Ralff told me that he would give a copy to Marlene.'' There is no discrepancy, however, about the facts that Robertson had been at the facility that day, that she spoke with Guidry near the end of the workday, that she acknowledged having seen a copy of his letter, and that she declined to discuss the subject at that time because she was hurrying to leave Fresno to return to the Los Angeles area. Robertson testified that she had ''told [The office] to fax [Guidry's letter] to Bill Clark'' and that ''I told Mr. Clark that whatever is the law, and proper to handle, you handle it for me.''

Clark testified, however, that ''it was sometime in March that I saw a copy of'' Guidry's February 25 letter and, moreover, that he chose not to respond to it. No one from ''The office'' testified to having faxed Guidry's letter to Clark on February 25, nor, for that matter, on any other date during the remainder of February.

On Saturday, February 29, Robertson and Clark, accompanied by several Pasadena employees, drove from Good Shepherd Convalescent Center to Fresno. Following their arrival at the facility, employees who were not to be retained on and after March 1 were notified of that fact, some in person and others by telephone. Personnel who were to be retained each received an offer of employment to be signed, signifying acceptance of its terms, or not signed as each recipient saw fit. So far as the evidence shows, none of the employees presented with an offer declined to execute it.

Equally significant was Clark's testimony describing his own activities at the facility that day. He testified that, on arriving at the facility, he had ascertained more precisely the scope and composition of the bargaining unit, which had not been completely clear to him before then. He made two lists, one of unit employees to be retained and the other of those who would not be retained. ''And I came up with a 24–26 number. 24 to be, and 26 not to be'' retained, according to Clark, ''And both lists had some questionables as to part timers and how much, how many hours they worked, that sort of thing. But 24–26 is what I came up with.''

He further testified that ''I then, I sought out Marlene,'' and after ascertaining from her that she intended to hire replacements for the 26 employees not to be retained and that she intended to hire 2 extra maintenance employees, ''I explained to her the numbers situation that it appeared that . . . we might be in a situation where we couldn't and did not have to bargain with the [U]nion.'' However, Clark also testified that he had not made a firm determination concerning Respondent's bargaining obligation until ''late March, possibly early April'' when ''I saw the hiring patterns . . . and I saw that there was somewhere in probably early April a [sic] establishment of a reasonable work compliment of people that indicated the numbers were such that the [U]nion was in a minority status.'' Yet, despite his uncertainty about the Union's majority status for, at least, most of March, Clark made no effort to communicate with the Union regarding recognition and bargaining for employees of the facility.

In the context of the foregoing sequence of events, the General Counsel alleges that Respondent has been a successor employer of Kearney Heights Care Center, Inc. and ad-

vances alternative theories to show, argues the General Counsel, that Respondent violated Section 8(a)(1), (3), and (5) of the Act. The more narrow one is the somewhat conventional theory that, in an effort to avoid having to recognize and bargain with the Union, Respondent jockeyed the unit employee selection process so that less than a majority of Kearney Heights Care Center, Inc.'s former employees would be employed in unit classifications on and after March 1. In fact, aside from the number of unit employees retained on and after that date, there is no dispute that throughout the first 3 months of 1992 the same operations for the same patients and classes of patients had been conducted at the same location, with essentially the same equipment and immediate supervision.

Less frequently encountered is the General Counsel's broader alternative theory that, in fact, Respondent had controlled operation of the facility since February 1 and, as the effective employer from that earlier date, had actually become the successor employer on February 1, retaining that status thereafter as the Union made demands for continued recognition and bargaining, post-March 1 employment terms were formulated, and unit employees were selected for what had been in reality termination.

For the reasons discussed above, there is no inconsistency between those two theories in the context of the facts of the instant case. I conclude that a preponderance of the credible evidence supports both of them. That is, it shows that Respondent actually began managing the facility on February 1, as it awaited issuance of its license to do so, but that it failed to continue recognizing and bargaining with the Union, despite requests that it do so. Also, after February 1 it formulated new employment terms and then implemented them without prior notice to the Union and without affording it an opportunity to bargain about those changes. Finally, as the effective date for the license loomed, Respondent reduced the number of incumbents in unit job classifications as a shield to subsequent application of the successorship doctrine that would oblige it to recognize and bargain with the Union, using the date of license issuance to disguise its actual prior management and operation of the facility.

IV. DISCUSSION

Although not arising frequently, the General Counsel's second, broader, alternative theory is not without precedent. That is, there is authority for the proposition that successorship can occur during a transition period after finalization of an enterprise's purchase, but before ownership or entrepreneurial control actually changes hands. Any ''assertion that 'there cannot be successorship without ownership' is contrary to the law,'' inasmuch as an acquiring ''employer may be subject to successorship obligations despite the fact that there has been no transfer of title to the assets.'' *East Belden Corp*., 239 NLRB 776, 791 (1978), enfd. mem. 634 F.2d 635 (9th Cir. 1980), and cases cited there.

That is so because the successorship doctrine exists not as a mere consequence or incident of ownership interest. Rather, that doctrine promotes the statutory policy of avoiding, or at least minimizing, industrial strife to facilitate the flow of commerce. *NLRB v. Burns Security Services*, supra. That policy could be frustrated, or even negated completely, if acquiring employers could avoid successorhip obligations and create a new status quo in employment terms by simply taking control of enterprises before prospective ownership changes occur, making changes under the guise of predecessors' action, and, then, once the ownership changes occur, confronting bargaining agents with purportedly preexisting employment terms and conditions. ''The Board's traditional test for successorship status . . . is whether there is continuity in the employing enterprise.'' *Petoskey Geriatric Village*, 295 NLRB 800, 802 (1989). If such continuity is being maintained by an acquiring employer during an interim or transition period before ownership actually changes hands, then that acquiring employer is obliged during that interim or transition period to observe statutory bargaining obligations imposed under the successorship doctrine.

Having said that, it must also be said that caution should be exercised in evaluating acquiring employers' preownership conduct and activities whenever there is an interim or transition period between agreement to acquire and actual acquisition, as there likely will be whenever ownership changes of enterprises of any size. Obviously, acquiring employers will need to take some actions to, at least, ensure a smooth transition and, certainly, to ensure that the value of the enterprise is not diminished during any interim or transition period. For example, there is nothing so unusual in an acquiring employer's preownership review of an entity's personnel files or in tally of equipment and inventory that it can be concluded, of themselves, such conduct demonstrates that preownership successorship has arisen. Nor can it be said that one arises merely because an acquiring employer inspects the premises and lays plans for subsequent improvements to them.

Explaining its decisions in *East Belden Corp*., supra, and, later, in *Sorrento Hotel*, 266 NLRB 350 (1983), where a new lessee executed an interim management agreement to operate an entity while awaiting commencement of a long-term lease to operate it, the Board has pointed out that, ''The salient facts . . . triggering successorship status . . . were written agreements to purchase [in *East Belden*] or lease [in *Sorrento*] and an escrow or interim management period officially established for the prospective buyer or lessee to take control.'' *Fremont Ford*, 289 NLRB 1290, 1294 (1988). As described in section III, supra, on January 31 Respondent did execute an agreement with Kearney Heights Care Center, Inc. to take over the facility's operation and, on that same date, an agreement with MG Associates to lease the facility's premises and personal property. Consequently, as in *East Belden* and *Sorrento*, prior to February 1 written agreements existed for permanent occupation and operation of the facility by Respondent.

To be sure, neither the agreement nor lease became effective on execution. Each was conditioned on Respondent's acquiring a license from DHS to operate the facility. Yet, in the circumstances, it appears to have been a mere formality relatively certain to occur. As pointed out in section III, supra, Robertson is experienced in nursing. By January 31, she had operated a similar enterprise in Pasadena for a decade and a like one in Lake View Terrace for almost half a decade. For at least half a year she had laid careful plans for the facility's acquisition by Respondent, as shown by its incorporation during June 1991 in apparent anticipation that it would acquire and operate the facility. Given Robertson's experience in the profession and in the industry and, further, given her seemingly meticulous preparation for the facility's

acquisition, there seems ample basis for concluding that, as of January 31, securing a license to operate the facility had been, and should have been, viewed as a relative certainty.[2]

Inasmuch as Respondent possessed written agreements to lease the facility and to become its operator, and since it can be said that there was at least a respectable certainty that Robertson would surely secure a license from DHS for Respondent to operate it, attention must shift to whether a preponderance of the evidence shows, as contended by the General Counsel, that Respondent actually controlled and was managing or operating the facility during February. Unlike the situation in *Sorrento*, there is no evidence of any written agreement for Respondent to manage or operate the facility prior to March 1. However, the General Counsel does point to portions of four documents which, he argues, evidence actual control and managerial authority of the facility on and after February 1. First, article 1.3 of Respondent's agreement with Kearney Heights Care Center, Inc. provides expressly that the latter ''will not issue any instructions which would change the orderly operations of the facility without prior approval of [Respondent's] personnel.'' Standing alone, that provision might be said to accomplish no more than preservation and protection of an acquiring employer's interests from acts by a seller that reduce or diminish an entity's worth and viability before the actual change of ownership. Nevertheless, the provision did afford a measure of control to Respondent over the facility during February. More importantly, it does not stand alone in the instant case.

By letter dated February 1, the day after Robertson had executed the agreement and lease, Kearney Heights Care Center, Inc.'s copartner, Barfuss, notified DHS, ''Effective February 1, 1992 (Saturday), the following administrative changes have been made'' at the facility. The letter then states that ''Mr. John Ralff has been appointed Administrator at the [F]acility'' and that ''Mrs. Marlene Robertson, RN has been appointed Acting Director of Nursing.'' Under Cal. Admin. Code Tit. 22, § 72327, ''The director of nursing service shall have, in writing, administrative authority, responsibility and accountability for the nursing services within the facility.'' Respondent acknowledged that § 72327 applies to the facility's director or acting director of nursing. However, Robertson denied that she had ever been appointed to that position and further denied that she had occupied it at the facility during February. Yet, a series of problems confront the reliability of her denials.

In the first place, neither Majerus nor Barfuss, the copartners of Kearney Heights Care Center, Inc., could testify concerning the circumstances that had led the latter to prepare and transmit to DHS the February 1 letter. For over a year Majerus had been no more than a silent partner who was not consulted about decisions pertaining to the facility. Barfuss had passed away before the hearing had commenced. Nevertheless, the latter's letter does notify DHS that Robertson would be, in effect, exercising ''administrative authority, responsibility and accountability for the [facility's] nursing services,'' by far the largest number of employees working there, and, as such, does constitute substantive evidence of that fact, as a statement of ''then-existing state of mind'' within the meaning of Federal Rule Evidence 803(3). In fact, as that letter also recites, Ralff did become the facility's administrator on February 1.

Second, the accuracy of Barfuss' letter, and the unreliability of Robertson's denial of service as acting director of nursing at the facility during February, are reinforced by a third document: a notice posted on the bulletin board and, as it turned out, left at each nursing station on February 1. It recites:

Effective	2–1–92
Administrator	John Ralff 226–7533
Nursing	1) Beeper 488–9424
Marlene Robertson RN	2) Hand Phone 818–404–6853
	3) Talk or message #213–353–2012
	4) Beeper #818–410–4322

Claudia Bell—275-2485
Barbera [sic] Cleason—432–8941

All Dept. Head # Are As Posted

As one after another of Respondent's witnesses testified, each denied having prepared, or even having seen, that notice. Furthermore, while acknowledging that she had a beeper and hand phone and, also, that 818–404–6853 is her hand phone's correct number and that 213–353–2012 is ''my beeper number,'' Robertson denied that 488–9424 is the correct number for her beeper and that 818–410–4322 had been the correct number for her beeper in February—''I do not recognize this beeper.'' She further denied that 818–410–4322 had been her phone number, at all. But, witnesses had been sequestered and Director of Staff Development Clytemnestra Bell was called as Respondent's witness after Robertson had testified for it. Bell freely acknowledged having prepared, posted, and distributed to each nurse's station the above-quoted notice on February 1. Further, during cross-examination, she testified expressly that she had been given the phone numbers listed for Robertson by Robertson, herself: ''She was in the facility on February first, she gave me the numbers, I put them there, okay.''

In fact, Robertson and other witnesses for Respondent did agree that Robertson had acted as registered nurse, but not as director nor acting director of nursing, for the facility on February 1. They testified that the director of nursing service need not be present on weekends, that only a registered nurse need be on duty, that no registered nurse had appeared for duty on Saturday, February 1, that one or more state officials had shown up at the facility that day, and that, overhearing queries about the required registered nurse, Robertson had said that she was serving in that capacity that day. Yet, that explanation is not without its problems.

[2] There is limited evidence that, in the past, Robertson had been denied a license to operate a convalescent home in Bakersfield, California. However, there appears to be significant differences between denial of that license and her application for a license to allow Respondent to operate the facility. For, at the time of her Bakersfield license application, that home had been subject to bankruptcy proceedings. Further, in contrast to the situation here, Robertson acknowledged, ''We did not have the agreements to buy [the Bakersfield home] at that time.'' Consequently, the two situations, that of the Bakersfield home and of the facility, are not comparable. In fact, Respondent has presented no evidence that any factor pertaining to Robertson, as an operator, had led to denial of the Bakersfield home license. Nor has it presented evidence that any problem relating to the Bakersfield situation had existed with respect to the license application for the facility.

Certainly, it does not account for Barfuss' notifying DHS on that same date that Robertson would be serving as the facility's acting director of nursing. So far as the record discloses, he had not been aware of any problem involving a missing registered nurse at the facility that day. Moreover, while a director of nursing service must be a registered nurse, there is a difference between the two: not all registered nurses are directors of nursing service. Yet, it had been as the latter that Barfuss had notified DHS that Robertson would be serving, on an acting basis, as of February 1.

Nor does the explanation advanced by Robertson and by Respondent's other witnesses account for why Los Angeles-area telephone numbers would have been included on Bell's above-quoted notice. Had Robertson truly been filling in for only that single day, when she had already been in Fresno, there is seemingly no need for having listed on the notice numbers at which she could be reached after she returned to the Los Angeles area. However, Ralff conceded that ''818 area code certainly would be down in that area.''

The notice posted on one bulletin board remained there for a significant portion of February, as shown by Field Representative Guidry's description that he had gotten it off there and had made a copy of it ''around the 25th of February . . . or . . . a week or so earlier.'' Indeed, after he returned the notice to that bulletin board, there is no evidence that it later had been removed on any day during February. Yet, if its information regarding Robertson's role at the facility had not been accurate, the notice was publishing inaccurate information to the facility's employees, as well as to patients and the public.

Administrator Ralff, as well as Respondent's other witnesses, testified that a series of individuals, other than Robertson, had served as the facility's director of nursing service during February: Faley Mejia for a few days during the early part of that month, Hines Joswig later that month, and Betty Ralff off and on during the month. However, no notice similar to that posted by Bell on February 1 was produced. If it had been important on that single date for the staff to know of Robertson's role, as Bell testified, surely it would have been no less important for the staff and patients to be made aware of the presence and communication numbers of others serving in that same capacity, if they had truly done so, later that month.

Equally telling was Respondent's failure to produce copies of any letters to DHS, similar to that of February 1, giving notice of Robertson's appointment as acting director of nursing service, notifying DHS of appointment of a director or acting director other than Robertson. Bell admitted that the facility was obliged to notify DHS of changes in the director of nursing service. Although Ralff claimed that DHS had been notified of Joswig's appointment to that position and asserted that DHS should have that document in its files—adding conveniently ''and I notified them by telephone that my wife [Betty Ralff] was also an interim admin [sic] or director during that period in the interim''—Respondent produced no copy of a letter to DHS appointing Joswig, nor, for that matter, Mejia.

California Administrated Code Title 22, § 72327(a) requires that the director of nursing service ''be employed eight hours a day, on the day shift five days a week.'' To support its argument that Robertson had not actually occupied that position during February, Respondent's witnesses testified that she had not been at the facility during that month ''eight hours a day, on the day shift five days a week.'' However, read literally, § 72327(a) does not require actual presence, but only employment, leaving open an interpretation that availability, but not actual presence, would suffice for compliance. If that were a correct interpretation, of course, it would explain why Bell had included Los Angeles area telephone numbers for Robertson on the notice posted and distributed on February 1.

Even if actual presence is required by California Administrated Code Title 22, § 72327(a), that requirement would have been satisfied by appointing someone else to fill in for Robertson on days when the latter was not present at the facility. Thus, the presence of Mejia, Joswig, and Betty Ralff would appear to provide the required immediate presence, while Robertson maintained the ongoing overall responsibility during February. Significantly, neither Mejia nor Joswig appeared as witnesses, though there was no representation that either was not available to testify regarding their arrangement for service at the facility in February. What is clear is that, during February, Joswig had been no more than a trainee for director of nursing service. More importantly, after his retention in that capacity, he had left the facility and did not return there again for the remainder of that month. Accordingly, he spent even less time there than had Robertson during February.

In that respect, she testified that she had been at the facility on ''February 1 and 2, and then sometime on 8 and 9 and then 23 and 24. Then the 29th.'' Yet, she must also have been there on February 25, as well, since Guidry had encountered her there on that day when he had delivered his letter bearing that date to Ralff and had attempted to speak with her about bargaining, as described in section III, supra. In fact, Robertson ultimately agreed that she had been at the facility a number of times, adding hastily, ''To observe.'' But, she never explained exactly what she had been observing and, in fact, there had been yet one additional day that Robertson certainly had been in Fresno, if not at the facility. She, as well as Administrator Ralff and Office Manager Barbara Cleason, described a meeting in Fresno that started with breakfast at Denny's and then extended through lunch at Brooks Ranch. In fact, Ralff testified, ''We met all day long.'' Clearly, that meeting did not occur on one of Robertson's above-enumerated dates. For, while she testified that it had taken place during the first week of February, Cleason also testified that it had been ''later than'' February 1 and 2. Further, Ralff testified that they had not gone to the facility that day, which would also eliminate Saturday, February 8, and Sunday, February 9, because Robertson testified that she had been at the facility on both those dates.

The crucial point about that meeting, at this stage of discussion, is that it illustrates that Robertson had one alternative means for exercising management and control over the facility, without actually having to set foot on its premises—through the supervisors who did work on those premises. Aside from offsite meetings, communication with them was possible by telephone and by fax. In fact, Respondent's witnesses described communications by both means with Robertson during February. Furthermore, it is approximately only a 4-hour drive to Fresno from Los Angeles, as shown by Clark's description of the February 29 trip from Lake View Terrace to Fresno. Thus, it was possible for Robertson to rel-

atively quickly reach there from Los Angeles, should that become necessary. In sum, Robertson's lack of actual presence at the facility for ''eight hours a day, on the day shift five days a week'' during February is not so compelling a refutation of the evidence that she had acted as director of nursing service during that month, as Respondent now seeks to portray.

Even more compelling as evidence of Robertson's actual involvement in the facility's February management and operation is provided by the General Counsel's fourth document: Attorney Clark's August 1 letter to the Regional Office's investigator. In addition to the portion quoted in section III, supra, that letter states:

> While serving as DON Robertson was able to assess the abilities of the staff and to confer with staff members as to the desirability of retaining (or not) employees and staff of Kearney. Based on her observations and the recommendations of others, Robertson decided that a number of workers would not be offered employment.

However, when he appeared as a witness, Clark testified that he had made those statements before having conferred with Robertson and solely on the basis of Barfuss' February 1 letter to DHS, which had been transmitted to him by Cleason. In other words, testified Clark, ''I made the assumption that because Mrs. Robertson was appointed in the letter as DON, that that's what she did.'' Yet, in the circumstances, that explanation does not truly nullify the above-quoted statements in his letter.

In the first place, Clark testified that after sending that letter he had been alerted that the General Counsel was considering pursuing the alternative theory that Respondent had controlled the facility since February 1. He testified that it had been then that he first had discussed his letter with Robertson, at which time she had told him that she had not served as director of nursing service and had not selected employees to be retained after February 29. But, there is no basis for placing any greater reliance on her statements to Clark than on her testimony when she appeared as a witness in this proceeding. And she did not appear to be testifying candidly. Instead, as illustrated at various points throughout this decision, she seemed to be responding to particular questions with answers intended solely to buttress Respondent's position. As a result many of her answers were internally contradictory and others were inconsistent with other evidence presented by Respondent. Having been alerted as to the General Counsel's possible alternative theory, there is every basis for inferring that she would try to provide an alternative explanation for events, to those recited in Clark's August 1 letter, to extricate herself from potential liability.

Second, as set forth in section III, supra, Clark had accompanied Robertson's group to the facility on February 29. Aside from ascertaining the Union's representative status in light of the employees who were and who were not to be retained, he testified that he also wanted to ensure that none of the selection decisions had been motivated by unlawful considerations. So, testified Clark, ''I kind of cross examined Mrs. Robertson as to her knowledge of numbers and whether or not there was something that was planned.'' More specifically, he testified, ''I asked her if the decisions with respect to the employment of these people were biased in any way, be it because of the union situation or any other protected status. She said no.'' Clark further testified that he then had pursued that same line of inquiry with Bell, ''relat[ing] the same sort of thing to her.''

So thorough had Clark regarded his examinations that day that, in response to charges of discrimination filed with the State of California, concerning failure to retain certain employees after February 29, he stated in his response, ''The final decisions were made by me.'' He explained that he had made that statement because on February 29, ''I was fully prepared if I wasn't satisfied to overrule with respect to individuals. And so based on that final conversation that I had with [Bell] and with Mrs. Robertson, I felt that I had been in some way been putting my final approval on that decision.'' If that is the fact, Robertson's actual role in the selection process should have become clear to Clark when he ''cross examined'' her, as well as Bell, on February 29. That is, if, as she now claims, it had been the department heads, not her, who had made the selections, Clark would have learned that through his February 29 cross-examination. It follows that he would not have made the statements that he did on August 1 unless they were an accurate description of what he had learned on February 29. In sum, it is a fair conclusion that his August 1 letter correctly describes Robertson's role at the facility during February. No weight should be accorded to her postletter disavowals, made after the General Counsel had indicated that an alternative theory might be advanced based on her role at the facility during that month.

To be sure, Robertson's service as acting director of nursing service during February, of itself, might not necessarily support a conclusion that Respondent had controlled and managed the facility during that month. Yet, the fact of her actual service in that capacity does not stand alone. She admitted that she had received no payments from Kearney Heights Care Center, Inc. for having occupied the position of acting director of nursing service in February. And there is no other evidence that her, as it turns out, actual service in that capacity had been carried out in the interest of, or otherwise benefitted, Respondent's predecessor. In contrast, as Clark's letter recites, it did afford her an opportunity to evaluate the facility's personnel, as well as to ensure that operations were maintained during that month—objectives that, in light of the January 31 agreement with Kearney Heights Care Center, Inc., benefited Respondent, not its predecessor. Indeed, Ralff testified that he had been willing to resume employment as the facility's administrator only after having been assured that Respondent would become its operator.

Third, each of Respondent's witnesses appeared to become evasive and uncomfortable when the subject of February new hires at the facility was raised. In fact, the evidence shows that there had been at least two persons newly hired there during that month. Both had been referred by Robertson after each had worked or, at least, trained at Robertson's Pasadena facility. At one point she testified that she had referred them to the facility because ''We did not have any opening in our [Pasadena] facility, so I asked Claudia Bell if she has opening and I referred some people to apply here.'' Somewhat inconsistently, Robertson then testified that Bell had ''told me that the facility is in—has problems because a lot of [employees] are taking vacations and taking off. So they need

some staff to cover,'' purportedly leading her to, in turn, refer those employees to the facility.

In fact, Bell corroborated neither of Robertson's above-quoted accounts. Even had she done so with respect to the second one, that would leave unexplained why Bell would have chosen to complain to Robertson about staffing problems if, in fact, Respondent had not been managing the facility and, thus, had not been in a position to rectify the shortage—which, of course, referral of Pasadena personnel would accomplish. Furthermore, so far as the evidence shows, the only newly hired employees at the facility during February had been individuals referred there by Robertson. And not one of Respondent's officials testified that she/he had been responsible for a decision to hire the employees purportedly only referred by Robertson.

Most significantly, though denied by Robertson, Guidry credibly testified that when he had approached her at the facility on approximately February 25, requesting bargaining, she had responded that she could not do so as a license had not issued and ''she was managing [the facility] temporarily'' or ''was just running the place.'' Whichever of these responses Robertson actually uttered, both convey the same thought: that Robertson had been actively managing the facility and, accordingly, actually controlled its operation. Inasmuch as she admittedly had not been paid by Kearney Heights Care Center, Inc. for ''managing temporarily'' the facility nor for ''just running the place'' during February, clearly she had not been doing so in the interest of Respondent's predecessor.

Given the experience of the facility's professional and supervisorial personnel, the fact that patients required careful care did not require ongoing onsite presence of the facility's top management. Indeed, the absence of both Barfuss and Majerus prior to January 31 graphically shows as much. Moreover, there is no evidence of Robertson's ongoing presence there after Respondent had acquired its license. In light of all the considerations discussed above, I conclude that a preponderance of the credible evidence does establish that Respondent had become the successor to Kearney Heights Care Center, Inc. on February 1 and, thereafter, effectively managed and controlled the facility's operations. Since Respondent simply ignored the Union's February requests for recognition and bargaining and, further, formulated during that month new employment terms which were then implemented on March 1, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by that conduct. In addition, it violated Section 8(a)(5) and (1) of the Act by its unilateral mass replacement on February 29 and March 1 of unit personnel whose performance it regarded as less than satisfactory.

In some situations that conclusion would eliminate the need to resolve the further question of Respondent's motivation for those February 29–March 1 terminations. After all, reinstatement and backpay remedies are the same for both unilateral and unlawfully motivated acts. However, Respondent presented some testimony that a few of those terminated employees may not have been actually in the unit on February 29, either because they had worked too few hours to qualify for regular part-time status or may have ceased working for Respondent. The problem with that evidence is that I am simply not too certain how much reliance can be placed on it, as illustrated by an incident occurring on the first day of the hearing.

During Ralff's appearance as an adverse witness called by the General Counsel, a dispute arose as to whether all registered nurses and licensed vocational nurses had been retained after February 29. Counsel conducting the hearing for Respondent denied that fact, asserting ''some of them were not,'' based on ''other information'' provided to him. So far as the record discloses, that ''other information'' could have come only from Respondent. Based on my over quarter of a century experience with west coast law firms and their members, I am familiar with that counsel and his firm. I know counsel to be honorable and his firm to be highly respected. There can be no question of his candor, based on the information provided to him by Respondent, in representing that registered nurses and licensed vocational nurses had not all been retained after February 29.

The problem is that Robertson, as well as most of Respondent's other witnesses, later contradicted that representation, by admitting that all registered nurses and licensed vocational nurses had been retained, ''Because it's difficult to get licensed personnel in the area. And since I'm a Registered Nurse, I can teach them,'' testified Robertson. In short, Respondent's witnesses contradicted the representation of its own counsel made on the basis of information provided to him by Respondent. As a result, I am left to conclude that Respondent was no more candid with its counsel than were its witnesses when they testified in this proceeding. It follows that without inspection of payroll records and personnel files, it is not possible to accurately determine the employment status of each alleged discriminatee during the first 2 months of 1992. Of course, that can be accomplished during the compliance phase of this matter. But, since compliance may disclose that some of those individuals had not, in fact, been part of the unit during that period, even though Respondent believed them to be on February 29, they might not be entitled to reinstatement and backpay under an 8(a)(5) and (1) conclusion. Accordingly, it is necessary to evaluate Respondent's motivation for not selecting employees in classifications described by the unit for employment after February 29.

Relying essentially on Respondent's pre-March 1 disguised operation of the facility, the timing of those terminations in relation to Respondent's acquisition of a license to operate the facility, the fact that just enough employees were terminated to leave the number retained a distinct minority of the pre-March 1 unit complement, and Respondent's unwillingness to recognize and bargain with the Union, the General Counsel argues that the evidence shows that Respondent effected those terminations to avoid having to deal with the Union. If so, that means that the union activities of particular terminated employees is not a relevant consideration, for Respondent could accomplish that objective by simply reducing the total complement of unit employees, without regard to the union activity of particular employees retained or terminated.

In opposition, Respondent points to the evidence concerning the employment records of those employees who were terminated. Indeed, viewed in isolation, those records might well support a successor employer's decision to terminate employees, so that future operations might be conducted without risk of state-issued citations and fines and, further,

without perpetuation of other problems that had impeded successful past operations. Yet, in evaluating motivation, the crucial focus of inquiry is not whether valid grounds existed for an employer's actions. *NLRB v. Symons Mfg. Co*., 328 F.2d 835, 837 (7th Cir. 1964); *Singer Co. v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1980). Instead, the crucial consideration is whether or not those grounds actually motivated the particular actions taken by that employer. See, discussion, *Hogan Mfg*., 309 NLRB 949, 953 (1992), and cases cited therein. Here, Respondent advances three specific arguments which, viewed in light of all evidence presented, are contradicted by the record and, in turn, cast doubt on any contention that the terminations had been legitimately motivated.

First, Respondent argues that on February 29 Robertson had lacked any knowledge of the successorship doctrine and, more particularly, of the significance under it of the number of a predecessor's employees hired by the succeeding employer. However, while Robertson so testified, the fact is that Attorney Clark came with her to Fresno on that date, so far as the evidence discloses, for no purpose other than to compare the compliment of employees retained against the unit description and the number of employees previously employed in unit classifications. Aside from cross-examining Robertson and Bell about the basis for particular selections, there is no evidence of any other activity conducted by Clark at the facility that day. Now, had Robertson truly been unaware of the effect on a possible bargaining obligation of the number of employees retained, there would have been no reason, so far as the record shows, to have Clark accompany her to the facility on February 29.

But that is not the only evidence pertaining to Robertson's knowledge of successorship. Clark testified that he had specifically refrained from informing her about that doctrine. But, neither he nor counsel conducting Respondent's defense in this matter had been her only representatives over the course of events pertaining to the facility. Separate counsel, Robert Blakely, had represented her in connection with the facility's acquisition—in negotiating the lease with MG Associates and the agreement with Kearney Heights Care Center, Inc. He did not appear as a witness for Respondent, though there was no representation that he was not available to do so. She did not describe the content of her discussions with him during 1991 and early 1992.

More significant is Robertson's relationship with an individual named Manny David whom she described ''as a guarantor'' for Respondent's acquisition of the facility and whom, she testified, is ''my partner in Good Shepherd.'' In addition, Robertson identified other nursing homes that David had acquired and is operating. While she initially admitted that he told me that he had been through a hearing ''over buying a convalescent facility and having terminated more than half the bargaining unit,'' she then added quickly, ''but he doesn't discuss with me.'' Pursued about the subject during cross-examination, Robertson claimed ''I never remembered'' if David had told her that he had been through a Board hearing concerning the termination of employees when he had taken over a facility. However, she ultimately allowed that ''Maybe'' he might have told her about it.

Like Blakely, David did not appear as a witness in this proceeding and, so, did not testify concerning what he had told Robertson. But, he had been present with her during the above-mentioned Denny's/Brooks Ranch meeting that took place during the first week of February. Both Robertson and Ralff admitted that employee selection for the facility had been discussed during the course of that meeting that day. Consequently, there was ample opportunity for David to have related his own past experiences to Robertson.

Robertson is a highly successful individual who, as described in section III, supra, has advanced steadily in the health care field. During the hearing she impressed me as a very meticulous person. During her meeting with the facility's staff in 1991, also described in section III, supra, she had been alerted to the Union's status as the representative of some facility employees. Given her past experience as a convalescent home operator and her apparent care in what she undertook, it seems illogical that she would simply have ignored the Union's presence at the facility and would not, at least, have attempted to ascertain the consequences to her plans of its representation of some facility employees.

In fact, there is evidence that Robertson had done so. Clark testified that ''in '91, I knew that she had an interest in the facility but that didn't work out'' and, thereafter, ''I heard nothing about that facility until she called me the morning of February 4'' to arrange a meeting later that same day with Clark. At that meeting, testified Clark, ''I learned that [the collective-bargaining] contract had expired in August or September of 1991. I was told that negotiations were on going [sic] for a new contract between Kearney Heights and Local 250.'' In addition, Clark testified, ''I learned and saw a copy of the letter from the [U]nion and Kearney Heights extending the contract on an indefinite basis.''

Inasmuch as only Clark and Robertson had been present during that February 4 meeting and since Clark's involvement in the facility's acquisition had been nonexistent during the period immediately preceding his February 4 meeting with Robertson, the information about the Union that he learned and saw that day had to come from Robertson. Yet, she gave no testimony regarding how she had come to learn about the status of recently ongoing negotiations and to have received the documentation which she showed Clark on February 4. Inasmuch as Clark had not provided it, Robertson had to have obtained it from another source and that refutes any assertion that Clark had been her exclusive source of information concerning the union and labor relations. Given that fact, as well as David's presence and participation in events surrounding the facility's acquisition by Respondent, Robertson's own grudging concession of knowledge about his past union difficulties arising from a similar acquisition of a convalescent facility, and the other considerations recited above, I conclude that there is ample basis for infering knowledge by Robertson during February regarding the significance of hiring particular numbers or percentages of unit employees on an acquiring employer's obligation to recognize an incumbent bargaining agent.

Second, in general, Respondent's witnesses portrayed the actual selection process as having been authorized by Robertson in mid- to late February, as having been carried out by department heads because each was most familiar with personnel that she/he immediately supervised and as having been finalized during the last week of February when the results were faxed to Robertson in Los Angeles. But, comparison of the accounts advanced by Respondent's supervisors reveals a number of significant inconsistencies and, in one instance, a significant contradiction of that superficially plau-

sible, generalized description of the supposed selection process. One example arose respecting the source of the purported decision to delegate to department heads responsibility for selecting employees to be retained. Ralff claimed that the decision had been ''a joint conclusion by Ms. Robertson and myself'' after she, he believed, had initiated discussion of that subject. He did not provide any details of that purported discussion. In fact, he did not even testify as to when it had assertedly occurred. However, when she testified, Robertson effectively contradicted Ralff, portraying that decision as having been exclusively her own because she had followed a similar procedure when she had taken over the Pasadena and Lake View Terrace facilities. At no point did she testify that Ralff had even contributed to that decision's formulation.

Relatedly, Robertson testified, ''I told the Administrator, Mr. Ralff, and then also Department head[s] to select the better employees.'' But, none of the department heads—Bell for nursing, Dietary Service Supervisor Edna Paige and Maintenance Supervisor Alvin Goree—testified to any direct communication with Robertson about selecting employees to be retained. To the contrary, when they testified, they repeatedly denied that Robertson had any direct contact with them or with the facility during February, thereby attempting to fortify Respondent's defense that it had not managed and controlled the facility during February.

Office Manager Cleason, supported by Robertson, described a telephone conversation during which the latter had instructed the former to institute the selection process by directing department heads to undertake it. Cleason further testified initially, ''I talked to Claudia Bell'' and ''I told her . . . that she needed to go through the nursing assistants and to decide who she would really like to keep, who were the better employees or best employees,'' after which ''Claudia went through the nursing assistants. And she decided if they were, shall we say, some of the best of the employees and some of the worst of the employees and some who were in between.'' However, that description was contradicted by Bell. For example, with force and specificity during cross-examination, she testified that her review of employees had been a ''two people review'' and that it had been a ''file review that had been done by Barbara and I.'' Bell gave no description whatsoever of having individually reviewed the employees.

In fact, as Cleason's testimony progressed, she also described a joint review with Bell, explaining that after Bell had categorized employees that the latter supervised, ''She and I discussed it'' and conducted a joint review of those employees' personnel files, ''Off and on, [over] a week, a week and a half.'' Yet, if, as Cleason described initially, Bell had already evaluated and categorized employees that she supervised, there seemingly would have been no purpose for a second, prolonged, review of those same employees and their personnel files. Indeed, while Cleason is a department head, she had not been directly supervising any unit employees and, based on Robertson's professed desire to have the selections made by those who ''knew them, their work habits . . . their performances,'' it seemingly makes no sense for the office manager to have actively participated in that process.

Unless, of course, that participation provided a monitor's control to ensure that the sum of purportedly individual supervisor selections yielded a predetermined result with respect to the total number of employees selected. Significantly, that very conclusion tends to be shown by Maintenance Supervisor Goree's description of what had occurred when he had reported that he would prefer to retain all laundry and housekeeping employees whom he then supervised: ''Well, what happened Barbara Cleason—they had a list, Barbara Cleason had went over it and that was the end of it,'' with the result that although he ''mostly'' had not wanted to put anyone on a list not to be retained, his opinion ''didn't make no difference'' to Cleason.

Along with Robertson, Ralff, and Cleason especially appeared to be tailoring their accounts of events to correspond to Respondent's interests or, at least, to cause the least injury possible to them, rather than to be candidly describing events as they had occurred. I do not credit them. Conversely, Goree's testimony, as well as the timing and ratio factors mentioned at the beginning of this discussion of Respondent's motivation, support a conclusion that Respondent started the selection process with the preconceived objective of terminating just enough unit employees, ostensibly selected by more than one immediate supervisor, to escape having to recognize the Union under successorship principles, as Respondent has contended that they should be applied as of March 1. That is, rather than showing that Respondent had reviewed individual employees to ascertain, on the merits of each's past performance, which ones should be retained on and after March 1, the credible evidence shows that Respondent had culled through unit employees' past performances to locate enough with deficiencies, no matter how relatively remote, that could be advanced as pretexts to disguise a refusal to continue employing a majority of unit employees after February 29, thereby resisting application of the successorship doctrine, as Respondent has argued it should be applied, and avoiding having to recognize and bargain with the Union.

Of course, Robertson testified that it had not ''ma[d]e a difference to me'' whether the Union had represented her employees. But, that admittedly had not been the attitude of all of Respondent's department heads. Cleason, the monitor for the selection process, has been heard by Goree to say, he testified, that ''she just didn't like [the Union].'' Of course, that had occurred ''way before a year'' prior to his appearance as a witness in this proceeding. Yet, that appearance occurred almost a year after the events at issue. Thus, Cleason's expression was not so remote to the actual selection process as might facially appear from Goree's testimony. Moreover, there is no evidence of any intervening event after Cleason's remark that would allow an inference that she had experienced a change in attitude respecting the Union.

Given Cleason's expression of dislike of the Union and her active participation as a monitor in the selection process, it could be said that, regardless of Robertson's own attitude, Cleason had simply taken it upon herself to jockey the Union out of the picture through that process.[3] Yet, it does not

[3] The General Counsel also alleges and argues that Paige made certain remarks that violated Sec. 8(a)(1) of the Act. However, I am not satisfied that the testimony underlying those allegations and argument can be said to be reliable, based on my observation of the manner in which it was given and on a review of that and related evidence in the record. Accordingly, I do not conclude that a pre-

Continued

seem altogether fair to simply lay off on Cleason, alone, an unlawful motivation that appears more properly attributable to her superior.

As concluded above, it had been Respondent who had actually operated the facility since February 1. It had been Respondent which had ignored the Union's February 4 bargaining request, a copy of which had been sent to Ralff. It had been Respondent which had resisted the Union's February 25 written and oral recognition and bargaining demands. It had been Robertson who had authorized a selection process that left less than half of the pre-March 1 unit employment complement employed at the facility. It is Respondent that has utilized the results of that selection process to resist having to recognize and bargain with the Union. Therefore, I conclude that Respondent, not solely Cleason, followed that selection process for the purpose of eliminating more than a majority of unit employees previously employed at the facility so that, in turn, it could resist recognizing and bargaining with the Union under successorship principles, thereby violating Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

Golden Cross Care II, Inc., d/b/a Golden Cross Health Care of Fresno has committed unfair labor practices affecting commerce by refusing to recognize and bargain with Hospital & Health Care Workers' Union, Local 250, Service Employees International Union, AFL–CIO—as the collective-bargaining agent of employees in an appropriate bargaining unit of all full time and regular part-time nursing attendants, certified nursing attendants, dietary aides, housekeeping aides, laundry aides, janitors and cooks employed at the nursing and convalescent health care facility located at 1233 A Street, Fresno, California; excluding registered nurses, licensed vocational nurses, guards and supervisors as defined by the Act—by making unilateral changes in terms and conditions of those employees' employment, and by unilaterally replacing all employees in that unit whose work performance was deemed below standard, in violation of Section 8(a)(5) and (1) of the Act; and, by terminating and refusing to continue employing employees in bargaining unit job classifications to avoid having to recognize and bargain with the Union under successorship principles, in violation of Section 8(a)(3) and (1) of the Act. However, it has not violated the Act in any other manner.

REMEDY

Having concluded that Golden Cross Care II, Inc., d/b/a Golden Cross Health Care of Fresno has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to recognize and bargain collectively with Hospital & Health Care Workers' Union, Local 250, Service Employees International Union, AFL–CIO as the collective-bargaining agent for employees in an appropriate bargaining unit of all full time and regular part-time nursing attendants, certified nursing attendants, dietary aides, housekeeping aides, laundry aides, janitors and cooks employed at the nursing and convalescent health care facility located at 1233 A Street, Fresno, California; excluding registered nurses, licensed vocational nurses, guards and supervisors as defined by the Act. Further, as to changes made in employment terms and conditions of employees in that appropriate bargaining unit on and after March 1, 1992, it shall be ordered, on request by that labor organization, to restore those terms and conditions of employment and, moreover, to make whole those unit employees for any losses of pay and benefits suffered as a result of those unilateral changes, in accordance with normal Board principles. *Ogle Protection Service*, 183 NLRB 682 (1970); and *Merryweather Optical Co*., 240 NLRB 1213 (1979). Finally, it shall be ordered to reinstate all employees employed in job classifications described in the bargaining unit who were terminated on February 29 and March 1, 1992, and to make them whole for any loss of pay and benefits suffered by them as a result of those terminations, in accordance with normal Board principles. *F. W. Woolworth Co*., 90 NLRB 289 (1950). In addition, interest shall be paid on all amounts owing, as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Golden Cross Care II, Inc., d/b/a Golden Cross Health Care of Fresno, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Hospital & Health Care Workers' Union, Local 250, Service Employees International Union, AFL–CIO as the exclusive collective-bargaining agent of employees in an appropriate bargaining unit of:

> All full time and regular part-time nursing attendants, certified nursing attendants, dietary aides, housekeeping aides, laundry aides, janitors and cooks employed at the nursing and convalescent health care facility located at 1233 A Street, Fresno, California; excluding registered nurses, licensed vocational nurses, guards and supervisors as defined by the Act.

(b) Effecting mass terminations of employees regarded as less than satisfactory or otherwise changing any term or condition of employment of employees in the above-described appropriate bargaining unit without first giving notice to the above-named labor organization and affording it an opportunity to bargain about any proposed change.

(c) Discharging or otherwise discriminating against any employee to avoid having to deal with the above-named labor organization as the representative of employees in the above-described appropriate bargaining unit, or because of activity or support for that labor organization or any other labor organization.

ponderance of reliable evidence supports a conclusion that Paige had made comments that violated Sec. 8(a)(1) of the Act.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Hospital & Health Care Workers' Union, Local 250, Service Employees International Union, AFL–CIO as the collective-bargaining agent for employees in the appropriate bargaining unit described in subparagraph 1,a, above, and embody any agreement reached in a written contract.

(b) On request by that labor organization, rescind all changes in employment terms for employees in the above-described appropriate bargaining unit made on and after March 1, 1992, and make whole all employees and benefits funds, with interest, for any losses incurred as a result of those rescinded changes, in the manner prescribed in the remedy section of this decision.

(c) Offer immediate and full reinstatement to all employees in the job classifications of nursing attendants, certified nursing attendants, dietary aides, housekeeping aides, laundry aides, janitors and cooks who were terminated on February 29 and March 1, 1992, dismissing, if necessary, anyone who may have been hired or assigned to the positions from which they were discharged or, if any of their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay and benefits they may have suffered as a result of their discriminatory discharges, in the manner set forth above in the remedy section of this decision.

(d) Preserve, on request, and make available to the Board or its agents, for examination and copying, all payroll, business and other records necessary to compute the backpay, reinstatement, and restoration rights as set forth in the remedy section of this decision.

(e) Post at its Fresno, California facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice on forms provided by the Regional Director for Region 32, after being duly signed by its authorized representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that those notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be and it is dismissed insofar as it alleges violations of the Act not found.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''